Supreme Court, U.S.
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78-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

STEVEN F. ETHIER,

Petitioner,

v.

UNITED STATES POSTAL SERVICE, M. A. WRIGHT, R. E. HOLDING, BENJAMIN F. BAILAR, WILLIAM F. BOLGER, CHARLES H. CODDING, WILLIAM A. IRVINE, CROCKER NEVIN, HAYES ROBERTSON, JAMES V. P. CONWAY, JAMES C. GILDEA, JAMES R. BRAUGHTON, CLARENCE B. GELS, JOHN C. SCHUFMAN, EUGENE C. WALD, JOSEPH AUGUSTINE, ROCHELLE EASTMAN, WILLIAM MAURER, HARRY R. LINK, D, ERICKSON, A. DE MARCO, RICHARD HOLST, CHARLES JONES, J. E. McCALL, JOHN H. LLOYD, GEORGE MOUDRY, GEORGE F. MEAD, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, BRANCH 28, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

McGOVERN, OPPERMAN & PAQUIN
JAMES E. SCHATZ
1100 National City Bank Building
510 Marquette Avenue
Minneapolis, Minnesota 55402
(612) 339-6900
Attorneys for Petitioner

McGOVERN, OPPERMAN & PAQUIN
1100 National City Bank Building
510 Marquette Avenue
Minneapolis, Minnesota 55402
(612) 339-6900
Attorneys for Petitioner

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Steve F. Ethier, respectively requests that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 11, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has not yet been recorded and it is included as Appendix A (*infra*, pp. 1-9). The judgment of the United States District Court for the District of Minnesota was issued from the bench, and no formal opinion was filed by that Court.

JURISDICTION

The judgment of the Court of Appeals was entered January 11, 1979. Rehearing was not sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Does the Eighth Circuit decision in this case conflict with decisions in similar cases in other Circuit Courts of Appeal?

2. Should the Supreme Court issue a Writ of Certiorari to resolve that conflict?

3. Does the interpretation of the Postal Reorganization Act by the Eighth Circuit Court of Appeals in this case violate the congressional intent underlying the enactment of that Act?

The Petitioner submits that the above questions should be answered in the affirmative.

STATUTORY PROVISIONS INVOLVED

This case principally concerns 39 U.S.C. §1208 which provides as follows:

> (a) The courts of the United States shall have jurisdiction with respect to actions brought by the National Labor Relations Board under this chapter to the same extent that they have jurisdiction with respect to actions under title 29.
>
> (b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.
>
> (c) A labor organization and the Postal Service shall be bound by the authorized acts of their agents. Any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
>
> (d) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of the labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(e) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Because the great majority of cases involving a union's duty of fair representation have arisen under the Labor-Management Relations Act §301, this case also concerns, by reference, 29 U.S.C. §185 which contains essentially the same language as contained in the above-quoted provisions of 39 U.S.C. §1208 and which are set forth in their entirety at Appendix B.

STATEMENT OF THE CASE

This is a civil action brought by Petitioner against Respondents to enforce a collective bargaining agreement entered into between Respondent United States Postal Service (hereinafter referred to as "Employer") and Respondents National Association of Letter Carriers and National Association of Letter Carriers Branch 28 (hereinafter referred to collectively as "Union").

Prior to his discharge on April 15, 1975, Petitioner was employed by the Employer as a letter carrier. As a Postal Service employee, Petitioner was also a member of the Union, the exclusive bargaining agent for all Postal Service letter carriers under a collective bargaining agreement between the Union and the Employer (hereinafter referred to as the "Agreement").

On March 17, 1975, Petitioner received a notice from his Employer that it intended to discharge him for failure to properly perform his duties as a letter carrier. Immediately upon receiving the notice, Petitioner requested his union steward to institute a grievance on his behalf protesting what he believed

to be his wrongful discharge in violation of Article XV of the Agreement, providing that "no employee may be disciplined or discharged except for just cause . . .".

Upon being notified by Petitioner of his desire to initiate a grievance, the Union made a determination that the claim had substantial merit and agreed to process it through the appropriate contract grievance procedures. The Agreement provides that to initiate a grievance, the first step must be as follows:

> Step 1: The employee must discuss his grievance with his immediate supervisor within fourteen (14) days of when the employee has learned or may be reasonably expected to have learned of its cause. The employee may be accompanied by his steward or union representative if he so desires . . .
>
> The union may also initiate a grievance at Step One in accordance with the above.

Although the Union steward, upon whom Petitioner relied to initiate his grievance, discussed the grievance with certain Employer representatives, at no time within the appropriate fourteen day period did he discuss the grievance with Petitioner's immediate supervisor in Petitioner's presence. During this fourteen day period, Petitioner suggested that the steward should file a written grievance in order to assure Step One compliance. The steward declined, however, claiming that it was not required by the Agreement.

Nevertheless, on April 1, 1975, one day after the fourteen day time period, the steward did file a written grievance form with the Employer, although still no discussion was arranged between Petitioner and his immediate supervisor.

Upon learning of the Employer's denial of Petitioner's Step One grievance, a Step Two (a) hearing was subsequently re-

quested on April 9, 1975, as permitted by the Agreement. The Employer also generally denied Petitioner's grievance at this level on April 23, 1975. On May 5, 1975, a Step Two (b) hearing was requested, and on May 28, 1975, the Employer, by letter, again denied Petitioner's grievance and put the Union on notice that it considered the Union's defective Step One grievance initiation to be a complete bar to Petitioner's claim. An arbitration hearing on the grievance was then scheduled for November 12, 1975.

After learning of the Employer's position with respect to the Union's failure to properly initiate Petitioner's grievance, the Union's sole response was that it believed that it had complied with Step One as it interpreted that section of the Agreement. The Union did not institute a separate grievance alleging that the Employer had committed a separate violation of the Agreement by interpreting it in an incorrect manner. Moreover, the Union made no effort at the arbitration hearing to deduce evidence of the intent of the parties concerning the Step One language.

On March 18, 1976, the arbitrator ruled that the Union had not complied with the Step One grievance procedure because no discussion had ever taken place between the Union and the Petitioner's immediate supervisor, in Petitioner's presence, and that the dispute was, therefore, non-arbitrable.

Petitioner commenced this action by filing his *pro se* complaint in United States District Court in the District of Minnesota, Third Division, Civil No. 3-77-436, alleging *inter alia* that the employer had violated Article XV of the Agreement by discharging Petitioner without good cause and that, in handling Petitioner's grievance, the Union had breached its duty of fair representation. Jurisdiction of the District Court was based upon 39 U.S.C. §1208(b), (c) and (d).

After serving its answer, the Employer moved the Court for an order dismissing Petitioner's Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that Petitioner's Complaint failed to allege facts sufficient to demonstrate a breach of the Union's duty of fair representation and that, consequently, Petitioner was precluded from bringing an action against the Employer directly in view of the finality of the arbitrator's decision. At the same time, the Union moved the Court for an order dismissing Petitioner's Complaint pursuant to Rule 12 (b)(6) as well as for a Summary Judgment, also on the grounds that Petitioner had not demonstrated a breach of the Union's duty of fair representation. The motion of Employer and Union were heard together by the District Court for the District of Minnesota, and the Court, ruling from the bench, granted those motions. Judgment was accordingly entered on February 9, 1978. The judgment of the District Court was affirmed by the Court of Appeals for the Eighth Circuit on January 11, 1979.

Petitioner's essential contention was that a Union's compliance with its duty of fair representation imposed by *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1967), is tested by a court's examination of the total circumstances surrounding the Union's conduct. In this case, Petitioner contended that the trial court should have examined several separate factors involved in the processing of his grievance for wrongful discharge. First, the trial court should have examined the circumstances surrounding the Union's actions in attempting to meet the requirements of Step One of the collective bargaining procedure. Second, the trial court should have viewed the Union's actions

(a) in light of the gravity of the grievance and the potential prejudice to Petitioner as a result of a mishandling of that grievance, and (b) in light of the fact that a finding of a breach of the Union's duty would not impinge upon the countervailing policies counseling in favor of limiting a Union's liability to its members. Third, the trial court should have examined the circumstances surrounding the Union's response to the Employer's notice that the grievance was non-arbitrable because of non-compliance with Step One, and the trial court should have examined the Union's subsequent actions in preparing for the arbitration hearing. Petitioner contends that the facts of this case, when viewed as a whole, demonstrate a genuine issue of fact as to whether the Union perfunctorily handled his grievance, which thereby violated the *Vaca* standard.

Respondents essentially contended that the focus of the court's examination should be on the Union's steward's actions only, and that his actions amounted to no more than negligence or an error in judgment such that no breach of the Union's duty was committed. The Eighth Circuit, in affirming the District Court ruling, and by its opinion, has essentially adopted the Respondents' view.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision is in Conflict With Decisions of Other Circuits

A. *The Eighth Circuit's Test of Perfunctoriness is in Conflict With the Test That Has Been Adopted by the Sixth Circuit.*

In its opinion in this case, the Eighth Circuit has focused its examination wholly upon the actions of the Union's steward in attempting to process Petitioner's grievance. The court, in essence, held that a Union's representation is not perfunctory when its steward, who is unaware of the contract requirements for initiating a grievance, fails to properly initiate that grievance, even though an aggrieved employee is thereby precluded from having his grievance heard on its merits, so long as the Union makes a good faith effort to thereafter process the grievance. In defining its standard of perfunctoriness, the court stated as follows:

> We cannot believe the Supreme Court intended to give the word "perfunctory" the meaning suggested by Ethier. The word is defined in Webster's New World Dictionary, as "without concern or solicitude; indifferent." Certainly this record does not support an inference that the Union steward was unconcerned, unsolicitous, or indifferent. To the contrary, he pursued the grievance with vigor and erred only in failing to anticipate how the Agreement would ultimately be construed by an Arbitrator. We cannot impose liability for such failure. (Appendix A, p. 8).

Significantly, the Eighth Circuit, in enunciating its standard, did not provide for a consideration of the gravity of the

grievance in determining the level of care required of the Union. Nor did the court provide for consideration of whether the policies counseling in favor of limiting a Union's liability to its members would be impinged by finding a breach of the Union's duty in this case. Finally, the court refused to consider the Union's actions in processing the actions after the faulty initiation was attempted. (Appendix A, p. 7 at fn. 2).

The Sixth Circuit in the recent case of *Milstead v. International Brotherhood of Teamsters*, 580 F. 2d 237 (6th Cir. 1978), applied a much broader test than the Eighth Circuit in finding a question of fact as to whether a Union's representation was perfunctory on facts remarkably similar to the facts of Petitioner's case. In *Milstead*, an employee, through his union, began a grievance procedure against his employer alleging that he had been wrongfully discharged pursuant to the governing collective bargaining agreement. Prior to the time the employee was discharged, the collective bargaining agreement had been renegotiated and a provision which would have otherwise precluded his claim was omitted from the renegotiated agreement. However, during the course of the grievance procedure, all parties proceded under the assumption that the provision had *not* been omitted.

The employee's discharge was upheld at the final grievance hearing. The employee sued the Union, alleging that the Union's failure to point out the omitted contract provision violated the Union's duty of fair representation. The Union appealed an adverse trial court verdict to the Sixth Circuit Court of Appeals.

The Sixth Circuit held that the Union representative's failure to notice the omitted pertinent contract provision constituted a sufficient basis upon which to find that the Union's

representation had been perfunctory under the standard imposed by *Vaca v. Sipes*, 386 U.S. 171 (1967). The Court concluded:

> Certainly the duty of fair representation may be breached whenever a union ineptly handles a grievance because it is ignorant of the contract provisions having a direct bearing on the case. (580 F.2d 235).

Thus, it becomes evident that the Sixth Circuit's test of whether a union's representation was perfunctory is in conflict with the test adopted by the Eighth Circuit. As noted above, the Eighth Circuit's test is simply whether the union's representative's actions were "unconcerned, unsolicitious, or indifferent." However, the union agent's conduct in *Milstead* was clearly the opposite. The union agent there pursued the grievance in good faith although on a mistaken assumption of the contract requirements. In *Milstead*, the union's conduct could have certainly been characterized as merely negligent in failing to notice the omitted provision; however, the court in *Milstead* found a breach of the union's duty of fair representation in view of the union's heavy responsibility to make itself aware of the contract requirements and in view of the fact that to have raised the defense of the provision's omission would not have required the union to exercise its discretion in view of larger union interests. In the Eighth Circuit, in this case, the court found such "negligence" to be in compliance with the *Vaca* standard.

Similarly, in *Ruzicka v. General Motors Corporation*, 523 F.2d 306 (6th Cir. 1975), an employee also began a contract grievance procedure protesting his wrongful discharge under a collective bargaining agreement between his employer and his union. Although the employee's union took

the first step required of it under the contract, it failed to take the steps necessary to invoke the arbitration process even though it had indicated its intent to do so. The Sixth Circuit applied the "perfunctory" test to the facts before it and held that "such negligence handling of the grievance, unrelated as it was to the merits of the Appellant's case, amounts to unfair representation. It is clear example of arbitrary and perfunctory handling of a grievance." (523 F.2d at 310).

Significantly, the court in *Ruzicka* made particular note of the circumstances that the employee had been denied an opportunity to have his grievance heard on its merits because of the union's lack of due care. The same is true in the instant case.

The Eighth Circuit, in its opinion below has stated:

> Ethier cites *Ruzicka v. General Motors Corporation* . . . in support of his position. To the extent that they do, we decline to follow them.

B. *The Test of Perfunctory Conduct Adopted by the Sixth Circuit Would Cause Petitioner's Case to be Decided Differently By the Sixth Circuit.*

Under the different tests of perfunctory conduct adopted by the Eighth and Sixth Circuits, a contrary result would have occurred if the instant case had been decided by the Sixth Circuit. In Petitioner's case, as in *Milstead,* the Union ineptly handled Petitioner's grievance because its representative was unaware of the contract requirements. Under the Sixth Circuit's holding in *Milstead,* the court would have at least found a question of fact as to whether the steward should have known the contract requirements.

In addition, the Sixth Circuit would have considered the fact that Petitioner was precluded from having the merits of his grievance heard as a result of the Union's failure to be aware of the requirements of the contract. As noted *supra,* the *Ruzicka* court found that fact particularly significant.

C. *The Eighth Circuit's Test of Perfunctoriness Conflicts With Decisions of Other Circuits Which Have Considered the Circumstances of the Union's Conduct.*

While Petitioner believes that the conflict in the tests applied by the Sixth and Eighth Circuits is alone sufficient to merit granting of the requested writ of certiorari, the Eighth Circuit's test of perfunctory conduct is in apparent conflict with other circuits which have considered the circumstances surrounding the employee's claim and the union's subsequent conduct.

For example, in *Griffin v. International Union U.A.W.,* 469 F.2d 181 (4th Cir. 1973), the Fourth Circuit has required a union to exercise a greater degree of responsibility depending on the gravity of the actual violation alleged. In finding that the union had breached its duty of fair representation in the manner in which it had handled an employee's grievance of a wrongful discharge, the court in *Griffin* stated as follows:

> A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge—the industrial equivalent of capital punishment. (469 F.2d at 183).

cf., *Robesky v. Quantas Empire Airways, Ltd.,* 573 F.2d 1082 (9th Cir. 1978) in which the Ninth Circuit has required a

consideration of several distinct factors in judging a union's representation, one being the gravity of the grievance asserted.

Petitioner's grievance in this case was also based upon a discharge. Although Petitioner urged the court below to incorporate a consideration of the gravity of the grievance and potential prejudice to the Petitioner into its test of a union's conduct, the Eighth Circuit has confined its test to a determination of simply whether the union's conduct was "unconcerned, unsolicitous, or indifferent." Thus, this variance in the factors considered by the Eighth, Fourth and Ninth Circuits in their evaluation of a union's conduct reflects an additional apparent conflict which should be harmonized by this court.

II. The Eighth Circuit Test Violates the Employee's Right of Redress As Mandated By the Act; The Sixth Circuit Text Affords That Right Without Expanding The Union's Liability to Its Members.

Congress did not intend to take away an employee's right to have the merits of his grievance heard by giving the Union a degree of discretion in the administration of the grievance process. Indeed, this Court has held that the Union's duty of fair representation serves "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law", *Vaca v. Sipes, supra,* at 182.

Particularly, in the instant case, Petitioner was faced with the loss of his employment—"the industrial equivalent of capital punishment", *Griffin, supra,* with the Union as his counsel and the contract grievance machinery as his court. Traditional notions of fair play and justice require that, at

least, in a capital punishment case, he be accorded the chance to have the merits of his claim heard.

Significantly, *Vaca v. Sipes, supra,* upon which the Eighth Circuit relies, dealt with the amount of discretion to be accorded the Union in making decisions on the merits of employee grievances. To permit Petitioner the right to have merits of this grievance heard would not restrict the Union's discretion in screening meritless grievances. Rather, in the instant case, the Union made the determination that Petitioner's grievance *had* substantial merit. It would also not restrict the Union's discretion in the manner of presenting the merits of a grievance, *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976). Finally, it does not restrict the Union's discretion in allocating its group resources as in *Ford v. Huffman,* 345 U.S. 330 (1953). Consequently, it would appear that a jury could consider the propriety of the Union's conduct in the existing circumstances without impinging upon the countervailing policies counseling in favor of limiting a Union's duty to its members.

CONCLUSION

The Petitioner has been deprived of due process of law in the loss of his employment, as protected by Congress and a collective bargaining agreement, because of inadequate Union representation.

The Eighth Circuit would deny him the right to challenge that deprivation; the Sixth Circuit (and possibly other circuits) would grant him that right.

The Supreme Court should resolve this conflict by granting Petitioner this Writ of Certiorari.

DATED: April 10, 1979.

Respectfully submitted,

McGOVERN, OPPERMAN & PAQUIN
JAMES E. SCHATZ
1100 National City Bank Building
510 Marquette Avenue
Minneapolis, Minnesota 55402
(612) 339-6900
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1197

Steven F. Ethier,
Appellant-Plaintiff,

v.

United States Postal Service, M. A. Wright, R. E. Holding, Benjamin F. Bailar, William F. Bolger, Charles H. Codding, William A. Irvine, Crocker Nevin, Hayes Robertson, James V. P. Conway, James C. Gildea, James R. Braughton, Clarence B. Geles, John C. Schufman, Eugene C. Wald, Joseph Augustine, Rochelle Eastman, William Maurer, Harry R. Link, D. Erickson, A. De Marco, Richard Holst, Charles Jones, J. E. McCall, John H. Lloyd, George Moudry, George F. Mead, National Association of Letter Carriers, AFL-CIO, Branch 28, National Association of Letter Carriers, AFL-CIO,
Appellees-Defendants.

Appeal from the United States District Court
for the District of Minnesota.

Submitted: January 4, 1979
Filed: January 11, 1979

Before HEANEY, STEPHENSON and HENLEY, Circuit Judges.

HEANEY, Circuit Judge.

Steven F. Ethier was employed by the United States Postal Service (USPS) as a letter carrier. He was a member of the National Association of Letter Carriers, AFL-CIO (NALC), and Branch 28 of that Association. He served from January, 1974, to January, 1975, as a steward of the Branch. The National Association is signatory to a collective bargaining agreement with the USPS.

On March 13, 1975, Ethier was served with a Notice of Proposed Removal letter advising him that he would be discharged no earlier than thirty days from the date he received the notice. The letter advised him that he had a right to protest the proposed action by filing a grievance pursuant to the provisions of Article XV, section 2 of the 1973 National Agreement. That section provides as follows:

> SECTION 2. Procedure.
>
> Step 1: The employer must discuss a grievance with his immediate supervisor within fourteen (14) days of when the employee or Union has learned or may reasonably have been expected to have learned of its cause. The employee may be accompanied by his steward or a union representative, if he so desires. * * * The Union shall be entitled to appeal an adverse decision to Step Two of the grievance procedure within ten (10) days after receipt of the Employer's decision. Such appeal shall be in writing to the head of the installation or his designee.
>
> The Union may also initiate a grievance at Step One in accordance with the above.
>
> * * *
>
> [Step 4:] The failure of the aggrieved party or his representative to present the grievance within the prescribed time limits of the steps of this procedure including

> arbitration, shall be considered as a waiver of the grievance.
>
> It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the National level without going through the preceding steps.

On March 17, 1975, Ethier called the Union steward who had succeeded him and told him of the proposed discharge. He asked the steward to assist him in filing and processing a grievance contesting the proposed discharge. In the two week period following the call the steward, who was new to the job, investigated the matter and discussed it with USPS representatives on seven occasions. Ethier was present at some of those meetings. The steward stated in an affidavit that he believed that the discussions satisfied the Step 1 requirements of the Agreement.

On April 1, 1975, the steward filed a written grievance concerning the discharge with the USPS. He stated in an affidavit that he believed that if a written notice was necessary the notice was timely because it was filed within fourteen days of the date that the Union had been notified of the proposed discharge.

On April 15, 1975, the Postmaster wrote Ethier and advised him that the reasons given in the Notice of Charges were fully supported by the evidence and warranted his dismissal from the Service. He also advised Ethier of his right to appeal to the Civil Service Commission. Ethier, however, elected to have the matter submitted to arbitration and the Union processed the grievance to arbitration. In that proceeding the arbitrator held:

> [The] [g]rievance is dismissed as nonarbitral. No Step 1 discussion between grievant and his immediate supervisor was held within 14 days after the occurrence giving use to the grievance and thus no arbitral jurisdiction exists.

He stated that:

> The Union contends that this grievance was initiated by the Union and that no confrontation between the grievant and his immediate supervisor is required.
>
> The grievant here had been a Union steward and clearly must have known of the contractual requirements as to timeliness.
>
> In the case of the 1973 National Agreement the parties have specifically provided that "The Union may also initiate a grievance at Step 1 in accordance with the above."
>
> Clearly, the 1973 National Agreement extended the time for Step 1 and also provided for the Union to file a grievance but if the Union filed it, it had to do so in accordance with "the above"—which, inter alia, provides that the employee must discuss a grievance with his immediate supervisor within 14 days of the occurrence of the grievance.
>
> In this case grievant had until March 31, 1975, in which to initiate a discussion. None was held. The Union's discussion on April 4, 1975, was not with the immediate supervisor and grievant was not present. [Emphasis deleted.]

On October 11, 1977, Ethier filed a pro se complaint in the District Court alleging *inter alia* that the NALC breached its duty of fair representation in perfunctorily processing

his grievance.[1] On February 9, 1978, the District Court granted the NALC's Motion for Summary Judgment and USPS's Motion to Dismiss. Ethier appeals.

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) defined the duty of fair representation as follows:

> [A] Union [has] a statutory duty fairly to represent all * * * employees, both in its collective bargaining * * * and in its enforcement of the resulting collective bargaining agreement. * * * Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

At a subsequent point in the opinion the Court defined arbitrary conduct to include handling of a grievance in a perfunctory manner. *Id.* at 191. *See also Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-653 (1965).

Ethier's complaint alleges that the NALC's conduct was "so perfunctory that it was arbitrary, discriminatory, or in bad faith." The significant paragraphs of the complaint read as follows:

> 55. James Hiller undertook to file a grievance in the plaintiff's behalf and was relied upon by the plaintiff to file a timely grievance. Mr. Hiller failed to file a timely grievance pursuant to the Agreement between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, et. al., Article XIV, [sic]

[1] Ethier had filed two earlier pro se complaints containing essentially the same allegation. Both complaints were dismissed without prejudice.

section 2 which provides that a grievance must be filed within 14 days of when the employee or the union has learned of its cause.

56. The conduct of James Hiller as an agent of the National Association of Letter Carriers, AFL-CIO, Branch 28, and the National Association of Letter Carriers, AFL-CIO, was so perfunctory that it was arbitrary, discriminatory, or in bad faith, and constitutes a breach of a duty of fair representation to the plaintiff within the meaning of the Agreement between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, et. al., Article I section 1A.

Ethier's affidavit states in pertinent part that:

5. On March 17, 1975, the plaintiff notified James Hiller, a union steward, of his proposed removal, and Mr. Hiller undertook to file a timely grievance on behalf of the plaintiff. In a later discussion of the plaintiff's grievance, the plaintiff suggested to Mr. Hiller that he file the plaintiff's grievance at Step 1 in writing within fourteen days. Mr. Hiller told the plaintiff that he did not intend to file the grievance in writing because he was not required to file the grievance in writing. The plaintiff told Mr. Hiller that the plaintiff had had success with his practice of serving postal managers with written memoranda of the basis of grievances he had processed in the past.

6. On November 12, 1975, the plaintiff was present at an arbitration hearing concerning the plaintiff's grievance when the United States Postal Service asserted that James Hiller had not filed a grievance at Step 1 within fourteen days. The United States Postal Service introduced a grievance form filed by Mr. Hiller on April 1,

1975, the fifteenth day after he knew about the plaintiff's grievance. Mr. Hiller testified at the hearing that he had discussed the grievance several times during the fourteen days following March 17, 1975, and had fulfilled the requirements of the grievance-arbitration procedure. Eugene C. Wald, manager of Elway Station, and Joseph Augustine, the carrier foreman at Elway Station, testified that they did not remember that any Step 1 discussion of the plaintiff's had been held. In spite of Mr. Hiller's uncorroborated testimony, Arbitrator James J. Willingham dismissed the plaintiff's grievance as non-arbitrable.

The allegations of the complaint and statements in the affidavit do not support an inference that the Union handled the grievance in a perfunctory manner.[2] At best the allegations support an inference that the Union steward erred in construing the time limits set forth in Article XV, section 2 of the Agreement—an error which was understandable in the light of the specific language of the Agreement. Moreover, USPS management officials met with the Union steward on seven occasions in the period before the time limits expired and never told him that an initial meeting must be held with Ethier's immediate supervisor. The fact that the arbitrator ultimately held against Ethier on the issues of contract interpretation and waiver does not give rise to an inference of bad faith as perfunctory handling by the steward.

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[2] Ethier alleges in his brief on appeal that the Union made no effort at the arbitration hearing to present any evidence to support its position that the grievance had been properly filed, other than the uncorroborated opinion testimony of the steward. He implies that there existed, and the Union could have offered, addititonal evidence as to the intent of the USPS and the NALC in originally negotiating the language of the applicable provision of the Agreement. We find the contention without merit.

If Ethier's point of view were adopted, Unions would be subject to claims of unfair representation whenever a grievance was ultimately found not to have been timely filed. We cannot believe that the Supreme Court intended to give the word "perfunctory" the meaning suggested by Ethier. The word is defined in "Webster's New World Dictionary," as "without concern or solicitude; indifferent." Certainly this record does not support an inference that the Union steward here was unconcerned, unsolicitous, or indifferent. To the contrary, he pursued the grievance with vigor and erred only in failing to anticipate how the Agreement would ultimately be construed by an arbitrator. We cannot impose liability for such failure. *See Coe v. United Rubber, Cork, Linoleum & Plastic,* 571 F.2d 1349 (5th Cir. 1978); *Minnis v. Intern. U., United Auto., Aerospace, Etc.,* 531 F.2d 850 (8th Cir. 1975); *Griffin v. International U., United Automobile, A. & A. I. W.,* 469 F.2d 181 (4th Cir. 1972).

Ethier cites *Ruzicka v. General Motors Corporation,* 523 F.2d 306 (6th Cir. 1975), and *DeArroyo v. Sindicato De Trabajadores Packing., AFL-CIO,* 425 F.2d 281 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970), in support of his position. To the extent that they do, we decline to follow them. We note for the purpose of this opinion that in each case the Court found that the Union's conduct was inexplicable and here the reasons for the Union steward's actions are clearly set forth.[3]

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[3] In earlier cases presented to this Court, *Mavis v. Brotherhood of Ry., Airline & S. S. Clerks,* 585 F.2d 926 (8th Cir. 1978); *Florey v. Air Line Pilots Ass'n, Intern.,* 575 F.2d 673 (8th Cir. 1978); and *Augspurger v. Brotherhood of Locomotive Engineers,* 510 F.2d 853 (8th Cir. 1975), we held that improper Union motivation is the crux of the fair representation doctrine and is an essential element in all fair representation cases. We indicate here only that in an appropriate case, improper motivation may not be required where perfunctory conduct is alleged and proved.

The judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

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29 U.S.C. § 185 provides as follows:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.